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VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

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WE are indebted to Claude M. Dean, Esq., of the Richmond bar, for copies of opinions of the United States Circuit Court of Appeals, Fourth Circuit, Richmond, Va., one of which we publish in full.

WE publish amongst our leading articles a thoughtful paper by W. B. Kegley, Esq., of the Wytheville bar, on the subject of "Ordinary Care in the Use of High Explosives," in which the author criticises the definition of "ordinary care" laid down by the court in *Bertha Zinc Company v. Martin*, 93 Va. 791, 2 Va. Law Reg. 838. The particular doctrine to which objection is made, is that the ordinary care which is required of the master for the safety of his servant "must be ascertained by the general usages of the business." The same doctrine was criticised by the late Judge Burks, when editor of this journal, in a note to the case in question, published in full in Vol. 2 (*ubi sup*). We are in entire accord with the criticism. But on a careful reading of the opinion, we believe the court did not mean to tie itself down to the rule as announced, in the terms quoted, though it is so phrased in several places in the opinion. For example, the opinion quotes with approval, and apparently as authority for its ruling, the following more accurate statement of the rule from *Norfolk etc. R. Co. v. Ormsby*, 27 Gratt. 455: "Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence under all the circumstances would have exercised"—which doctrine the court says "has been reiterated in substance in subsequent cases as late as the case of *Richlands Iron Co. v. Elkins*, 90 Va. 249, 291." Evidently the court approved this doctrine, and yet it is altogether inconsistent with the rule as first above quoted.

In *Schwartz v. Shull* (W. Va.), 31 S. E. 914, where plaintiff sued his employer for injury by the explosion of dynamite, the West Virginia court cites *Bertha Zinc Company v. Martin* for the proposition

that "the measure of care imposed on the master for the safety of his servant in the use of dynamite, is that ordinary care *which reasonable and prudent men* would and do exercise under like circumstances."

If the measure of care is to be ascertained from mere usages of others in the same business, without reference to whether such others are reasonable and prudent persons or not, then by a combination of all employers in a particular line of business, all precaution might be abandoned, and yet the injured employees be without redress for injuries received as the direct result of the omission.

TO THE discredit of the legal profession, the terms "jackleg" and "shyster"—which we take to be synonymous—no longer serve to describe the lowest type of the lawyer. Another class has sprung up, for whom these terms are over-mild, and who are aptly described as "ambulance-chasers." With this newly evolved degenerate, the jackleg and the shyster have little in common. The two classes occupy a wholly different field and present few points of resemblance. As compared with the latest type, the former is a comparatively harmless individual. His sins spring rather from ignorance and necessity. He is not self-assertive in the company of his betters. He is content to skulk around the dark corners of the temple of justice, and in a quiet, inoffensive way, eke out a living by snatching a few forbidden crumbs from the altar when nobody is looking. His office, if he has one, is on a back alley. His raiment is threadbare, and his looks betoken an empty purse and a lean larder. His brethren of the bar pity rather than despise him.

But your ambulance-chaser is a wholly different style of person—in appearance and method. His net is spread in attractive quarters, and prosperity seems to perch upon his gilded sign. His personal appearance indicates money in bank, and credit at the tailor's. He knows by style and volume all the accident case-law of his State, and occupies his place within the bar with an air of self-contented proprietorship. His main business in life is to be in at the death, and to bear away the trophy—in the shape of a contract for a contingent fee—while the victim yet bleeds. An accident causes his mouth to water and his gastric juice to flow; and at the sight of blood he rehearses a declaration in trespass.

In the earlier stages of his career, he chased the ambulance in person, even to the hospital doors. With larger experience, he employs runners—thus covering a wider territory and following a bloody trail with

more despatch and less publicity. When the case is on, the next step is to win it. With half the recovery as a contingent fee, he takes no chances with the testimony. The right sort must be had, even if it is to be made to order. Weak points are strengthened and tell-tale admissions are hushed by judicious coaching,—often by indirect suggestion, for conscience sake—and the case is won with a flourish.

It is to be feared that this class of practitioners is yearly increasing; and with increase of numbers and added force of example, come a fiercer competition and more questionable methods. In Chicago, according to the *National Corporation Reporter*, lawyers who practise such methods are numbered by the legion. This blood-sucking generation has long been a stench in the nostrils of the great majority who have made, and are still making, the bar a shining example to all men, but the scandal has gone beyond the precincts of the profession, and is attracting the attention of the public press.

Doubtless Virginia is not exempt from the blight—though we believe the standard of morals maintained by the Virginia bar is not below that of any State in the Union.

We publish elsewhere an extract on this subject from the *New York Law Journal*, in which the opinion is expressed that lawyers who make a specialty of accident cases will almost without exception, sooner or later, be led into indecent and corrupt practices.

THERE is some confusion in the minds of Virginia practitioners as to the rule that a defense which amounts to the general issue, must be so made, and cannot be specially pleaded. This is doubtless due to the inaccurate form in which the rule is often stated. For instance, in 4 Minor's *Institutes* (3d ed.), 782, it is stated thus: "It is a general rule of pleading that what amounts to the general issue, that is, *what can properly be proved under it*, must be so pleaded." And in *George Campbell Co. v. George Angus Co.*, 91 Va. 438, 444-5, a plea was held properly rejected, because "evidence of such matters *was clearly admissible under the general issue*." Again, in *B. & O. Railroad Co. v. Whittington*, 30 Gratt. 805, 811, certain special pleas were held objectionable "because the same matter could be shown under the general issue." In either of these cases the decision was right, but the pleas were objectionable, not because "the same matter might have been shown under the general issue," but because they "*amounted to the general issue*."

Again, in *Fire Association v. Hogwood*, 82 Va. 342, 344, certain

pleas (it does not appear from the report what defenses they offered) were rejected "because provable under the general issue."

Doubtless this loose statement of the rule occurs in other Virginia cases. A very brief search discovered those mentioned. If the rule were in fact that what *may* be proved under the general issue *must* be so proved, it would follow, of course, that there could be no special pleas in an action of *assumpsit* or debt on a simple contract, save the few defenses—bankruptcy, statute of limitations, tender (4 Minor's Inst. 770) and possibly the statute of frauds—which are required to be specially pleaded. And yet it is every day practice to set up in such actions, by special pleas, numerous other defenses—such as gaming, infancy, coverture, release, accord and satisfaction, etc. And such pleas are proper: *B. & O. R. Co. v. Polly* (*infra*). No reference is made here to statutory recoupment under section 3299 of the Code (miscalled "special plea in the nature of a plea of set-off," though it has no kinship whatever with set-off), or to pleas of "payment" or "set-off," all of which are required or authorized by statute to be pleaded specially. Code, sec. 3295.

The true statement of the rule, as already indicated, is that "whatever *amounts* to the general issue, must be shown in evidence under it, and cannot be specially pleaded"—a wholly different proposition from that embodied in the statement that "whatever *may* be shown under the general issue *must* be so shown."

Curiously enough, Professor Minor, in another part of the same volume already quoted from, lays down the rule with great accuracy, explaining its application in detail, with abundant illustrations, and clearly pointing out its restricted meaning. Quoting from Lord Coke, he says: "'Pleadings which amount to the general issue are not to be allowed; but the general issue is to be entered;' and so are all the authorities. 3 Th. Co. Lit. 408, n. (B. 1); Stephens Pl. 418-419; 1 Chitty Pl. 567 *et seq.* And the intent of the present rule is to require, that if the matter of the defense be constructively and in effect the same as the general issue, it shall be pleaded in that form, and not in a more special way (Stephens Pl. 419). And what does thus in effect amount to the general issue, is determined by this general principle, namely, that *any matter of defense which denies what, on the general issue, the plaintiff would be obliged to prove, is of that character* (italics ours). On the other hand, any ground of defense which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff, upon the general

issue, would not be bound to prove or to dispute, in the first instance, may be pleaded specially." 4 Minor's Inst. (3d ed.) 1258.

In other words, a plea amounts to the general issue when it denies by anticipation some essential allegation of the declaration, which the plaintiff must himself prove to make out a *prima facie* case. And, conversely, although a defendant may make his defense under the general issue, he may yet plead it specially, where it is by way of confession and avoidance—where it gives color to the plaintiff's action, and avoids the effect by new matter of law or fact.

Hence in an action of *assumpsit* or of debt on a simple contract, the defendant may specially plead payment, release, coverture, infancy, accord and satisfaction, etc., though each of these defenses may also be made under the general issue. See *B. & O. Railroad Co. v. Polly* (*infra*).

As illustrations of what defenses amount to the general issue, Professor Minor mentions the following among others:

Declaration in trespass for entering plaintiff's garden.

Plea: "*Plaintiff had no garden.*"

This plea amounts to the general issue, because, in order to make out his case in the first instance, the plaintiff must prove that he did have a garden. The plea gives no color to the action.

Again: Declaration in trespass for depasturing plaintiff's herbage.

Plea: "*Defendant did not depasture,*" etc.

This plea is plainly anticipatory, denying what the plaintiff has undertaken to prove, gives no color, and amounts to the general issue.

So with the following:

Declaration in debt for the price of a horse. Plea: "*Defendant did not buy the horse.*" Declaration against two makers of a joint note.

Plea: "*It was the separate note of a co-defendant*" (*Van Ness v. Forest*, 8 Cranch, 35). Declaration in trover for the value of goods wrongfully converted. Plea: "*The goods were sold by defendant pursuant to plaintiff's order*" (*Kennedy v. Strong*, 10 Johns. 289).

Other illustrations readily suggest themselves. In an action against the endorser of a bill or note such defenses, for example, as "defendant did not endorse;" "the bill was not protested;" "the plaintiff failed to make demand," or "to give notice," etc.

The rule was correctly announced and applied in *B. & O. Railroad Co. v. Polly*, 14 Gratt. 447, 453, where Moncure, J., explains it in detail. "A plea," says he, "amounts to the general issue where it traverses matter which the plaintiff avers, or must prove, to sustain

his action; whether such traverse be direct or argumentative. . . . The plaintiff must prove the facts to sustain his action; and a plea traversing any of them, or averring facts inconsistent therewith, must, therefore, amount to the general issue."

In another part of the opinion (p. 454) the same learned judge thus well states the rule: "All matter of defense which give color to the action of the plaintiff, may be pleaded specially; and all matters of defense which do not give such color of action, amount to the general issue, and must be given in evidence under it. 1 Chitty Pl. 526, 530."

The test here laid down makes the application of the rule comparatively simple. Every defense which is by way of confession and avoidance, or gives color to the plaintiff's action, may be specially pleaded; but if it gives no such color, and denies by anticipation what the plaintiff must affirmatively prove, then it may not be specially pleaded, but must be set up under the general issue.

The converse of the rule that what amounts to the general issue cannot be specially pleaded—that is, that defenses which do *not* amount to the general issue may be specially pleaded—is not of universal application, or rather, is subject to be controlled by the trial court. The court has some discretion in preventing a multiplicity of pleas; and, in the exercise of this discretion, it may properly reject a special plea, where the defense set up may be shown under the general issue, though the plea be in itself unobjectionable. See *Crews v. Farmers Bank*, 31 Gratt. 348, 352-353; *Guarantee Co. v. National Bank*, 95 Va. 480, 3 Va. Law Reg. 873.

SEVERAL editorial discussions have heretofore appeared in our pages as to the effect of the act of 1893-4 (p. 83), amending section 2906 of the Virginia Code, upon the revivability of actions for personal injuries, and upon the period of limitation to such actions. The conclusion announced was that this amendment makes *all* actions for personal injuries revivable, and, therefore, under the provisions of section 2927, the period of limitation to such actions is extended by this amendment to five years. 1 Va. Law Reg. 694; 2 *Ib.* 27—(the latter by Judge Burks). Such a result would be deplorable—and more deplorable still, if the revivability of such actions brings with it assignability, as it probably does, since the one is the usual accompaniment of the other. *Lehmann v. Deuster* (Wis.), 70 N. W. 170, 37 L. R. A. 609; 3 Va. Law Reg. 609; *N. & W. R. Co. v. Read*,

87 Va. 185, 190. We feel sure that when the question shall present itself for decision, our Court of Appeals will make every effort consistent with the rules of law to find some escape from these conclusions.

In a recent letter from Prof. Graves, of the Washington and Lee University, who has felt deeply the unwisdom of this legislation, he suggests to us a construction which avoids the difficulties and inconveniences mentioned. We have been much impressed with Prof. Graves' suggestions, and, after mature deliberation, we believe that he has solved the difficulty, so far as the objections above mentioned go. In what we shall now have to say on the subject, the credit for the ideas presented belongs to Prof. Graves, the responsibility for their elaboration rests upon us.

In the first place, the amendment was evidently adopted *diverso intuitu*. Before the amendment, the pending action was only revivable where the plaintiff died *as the result of the injuries*. The purpose in view was obviously to prevent a failure of the pending action by the death of the plaintiff, *from whatever cause*, with no suspicion in the mind of the draughtsman that in amending this section he was radically altering the statute of limitations, found in a distinct chapter, or that he was authorizing the hawking of a claim for assault and battery about the streets, for sale to the highest bidder.

Again, section 2927 provides that the five years' limitation shall apply to every personal action for a tort, "if it be for a matter of such nature that in case a *party die* it can be brought *by or against* his representative; and if it be for a matter not of such nature, shall be brought within one year." That is, in order to survive, and in order to come within the five years' class, the cause of action must be of such nature that if *either party die*, *whether before or after action brought*, it may be brought by or against his representative. But this amendment does not provide that causes of action for personal injuries shall at all events and under all circumstances survive. It is applicable only to a *pending action*, and only where the *plaintiff* dies. If the *defendant* die, after action brought by the injured plaintiff, the action still abates as at common law. Or if the injured person himself die *before action brought*, whether as the result of the injuries or not, the cause of action abates; if, *as the result of the injuries*, his personal representative may maintain an action, but this action is upon a new and original cause of action, given by section 2902 (Lord Campbell's Act), and not in anywise based upon or derived from the cause of

action to which the injured person was himself entitled: *Anderson v. Hygeia Hotel Co.*, 92 Va. 687; and if he die, *before action brought*, and *not* as the result of the injuries, the action abates, as at common law, since it could not be maintained under section 2902—which permits an action only where the death is *caused* by the wrongful act of the defendant—nor under the amendment in question, since that permits the revival only where death occurs after action brought.

It is clear, therefore, that the action is not revivable generally, but only in the single contingency of *plaintiff's* death, and *after action brought*. Hence we may say, with some confidence, that a cause of action for personal injuries does not come within the class described in section 2927 as “of such a nature that if a party die it can be brought by or against his personal representative,” but rather in the class described in the same section as “not of such a nature,” and it must, therefore, be “brought within one year next after the right to bring the same shall have accrued.”

The other objections to the amendment, heretofore pointed out at some length, are of far less importance than these which Professor Graves seems to have successfully cleared away—but they are still important enough to call for legislative interference.

THAT particular compartment of the editor's desk, set apart for leading articles from valued contributors to the VIRGINIA LAW REGISTER, promises soon to be like Milton's goddesses, “empty of all good.” It is hoped that this announcement may induce those who have papers in the course of preparation to complete and transmit them without further delay, and those who have not thought of doing so, to consider whether they cannot contribute something to the general cause. Let each lawyer in the State who has an idea deemed worth communicating to others, consider himself hereby invited to contribute it for publication. The editor is unable, for lack of time, to personally solicit contributions. Indeed, by reason of the unfortunate and prolonged illness of a colleague, his duties in the class-room, already onerous, have become so burdensome that he finds himself at times fearing lest he must abandon the editorship of the REGISTER altogether. It is the keen and kindly interest of his brethren of the bar in the journal that has alone encouraged him to continue. The lawyers throughout the State have been most generous in upholding the publication. The younger lawyers have especially earned the editor's gratitude for the aid they have rendered. As far as he knows

or believes, this interest is unabated, and as lively to-day as at any time during the life of the journal. Any indication of the contrary would most certainly and quickly determine the editor upon the abandonment of a task which, as the profession is aware, fell upon him rather by accident, but a labor which has been a most grateful one. When the time comes that members of the bar must be sought out personally and solicited for contributions to fill its pages, the REGISTER will have a new editor or else cease to exist.

Our readers will pardon these personal allusions. They are contrary to our custom, but are deemed proper in order to bring sharply before our constituency the fact that upon their interest in the journal depends its future existence; and that evidence of their interest, in the shape of contributions to its pages, goes a long way toward holding up the hands of the editor when they are heavy with weariness or discouragement.